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CPLR 3216: Service of Forty-Five Day Demand by Ordinary Mail Permitted Where No Prejudice Is Shown

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these agreements.¹¹⁴ Unfortunately, however, the refusal to extend the benefits of CPLR 3213 could be motivated by the fact that this is the safer approach. For, the denial of a 3213 motion only prolongs the action; it does not even foreclose a subsequent motion under CPLR 3212.¹¹⁵ Nevertheless, it is anomalous to deny the possibly destitute spouse the advantages of CPLR 3213 while affording such relief in commercial transactions.¹¹⁶

CPLR 3216: Service of forty-five day demand by ordinary mail permitted where no prejudice is shown.

One year after joinder of issue, a motion to dismiss for lack of prosecution may be heard, provided that the motion is preceded by a demand for a note of issue.¹¹⁷ If the note of issue is filed within forty-five days, *all* delay is forgiven.¹¹⁸ However, the failure to comply with the demand warrants dismissal, either *sua sponte* or by motion of the aggrieved party, unless the recalcitrant party exhibits a meritorious cause of action and a justifiable excuse for the delay.¹¹⁹ Although dismissal is usually without prejudice,¹²⁰ its implications are obvious if the statute of limitations has run. For, CPLR 205 specifically excepts a dismissal under CPLR 3216 from its ambit.¹²¹

The imminency of a malpractice suit in the above situation impels familiarity with the exact procedures to be followed; yet, the constitutional dimensions of CPLR 3216 have pervaded judicial construction of the section.¹²² Now that the constitutionality of the sec-

¹¹⁴ See *Van Wagenberg v. Van Wagenberg*, 24 Md. 154, 215 A.2d 812, *cert. denied*, 385 U.S. 833 (1966); *Kochenthal v. Kochenthal*, 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966). See notes 17-18 and accompanying text *supra*.

¹¹⁵ 7B MCKINNEY'S CPLR 3213, commentary 4, at 832 (1970).

¹¹⁶ *Id.*

¹¹⁷ CPLR 3216. A condition precedent to the motion is that a year must have elapsed between the joinder of issue and the hearing date for the motion to dismiss. Hence, CPLR 3216 would seem to sanction a demand for a note of issue served 45 days before the end of the first year. 7B MCKINNEY'S CPLR 3216, commentary 16, at 926 (1970).

¹¹⁸ See *Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969).

¹¹⁹ CPLR 3216(e). For a list of the factors that a court should take into consideration when passing on a 3216 motion, see *Sortino v. Fisher*, 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).

¹²⁰ CPLR 3216(a). See 7B MCKINNEY'S CPLR 3216, commentaries 12-13, at 922-25 (1970).

¹²¹ CPLR 205 permits the commencement of a new action within six months of termination despite the fact that the statute of limitations has run. However, it expressly excepts termination due to a voluntary discontinuance, a dismissal for neglect to prosecute, or a final judgment on the merits. See 1 WK&M ¶ 205.06.

¹²² See *Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969). For a discussion of the history of CPLR 3216, including amendments and judicial hostility, see 7B MCKINNEY'S CPLR 3216, commentaries 1-4, at 910-17 (1970).

tion has been resolved, courts can focus on interpreting particular aspects of it. A problem recently posed centered on the efficacy of a demand for a note of issue which was served by ordinary mail, rather than by registered or certified mail as required under CPLR 3216.

In *Beermon Corp. v. Yager*,¹²³ the court found that despite the irregular mode of service plaintiff's attorney had not been prejudiced. Consequently, the court granted a motion to dismiss for lack of prosecution because a note of issue was not served within forty-five days, and the attorney's sole excuse was a busy schedule, which is not considered a justification for a denial of the motion. Moreover, the court took notice of the five-year lapse between defendant's demand for a bill of particulars and the appellant's compliance therewith.

Since the attorney in *Beermon* was not prejudiced by the irregular service, the court was justified in granting the motion to dismiss.¹²⁴ For, the demand did, in fact, serve its basic purpose: it apprised the attorney of his situation. And, the irregular service was not, in any event, related to the failure to file a note of issue within forty-five days. Hence, exacting compliance with the service requirements by the defendant was not mandated. Conversely, a slight delay by an attorney while attempting to comply with the demand should also be overlooked.¹²⁵

CPLR 5004: Conflict over legal rate of interest continues.

CPLR 5004 prescribes that "interest shall be paid at the legal rate." This rate, which is set under section 5-501 of the General Obligations Law¹²⁶ had traditionally been a flat 6 percent. An amendment to section 5-501,¹²⁷ however, authorized the Banking Board to adjust the rate of interest "upon the loan or forbearance of any money, goods, or things in action." Accordingly, during February of 1969, the Board adopted the maximum rate of interest of 7.5 percent.¹²⁸

Without a specific declaration of legislative intent, the courts had to determine the effect, if any, of the Board's action upon the

¹²³ 34 App. Div. 2d 589, 308 N.Y.S.2d 109 (3d Dep't 1970).

¹²⁴ See CPLR 2001.

¹²⁵ For example, where local court rules have thwarted an otherwise diligent effort to procure a note of issue, an extension should be permitted without requiring the plaintiff to exhibit that his previous delay was justifiable. 7B MCKINNEY'S CPLR 3216, commentary 26, at 934 (1970).

¹²⁶ N.Y. GEN. OBLIGATIONS LAW § 5-501 (McKinney 1964).

¹²⁷ *Id.* (McKinney supp. 1968).

¹²⁸ See § NYCRR 34.1 (1969).